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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-451

MORRIS I. COHEN, *Petitioner,*

v.

ANCHOR HOCKING GLASS CORPORATION, POWELL & OAKES, INC., and HERMAN GRANT, REGIONAL ATTORNEY FOR THE UNITED STATES DEPARTMENT OF LABOR, *Respondents.*

RESPONDENT POWELL & OAKES BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

Powell & Oakes agrees that this Court has jurisdiction under 28 USC 1254(1) to determine whether Cohen has presented any valid ground for granting a writ of certiorari.

QUESTIONS PRESENTED AS TO POWELL & OAKES

Powell & Oakes is but one of three respondents herein. Cohen's recitation of the questions presented for review does not define the questions so as to distinguish which question relates to which respondent. Insofar as Powell & Oakes is concerned, the questions presented for review would be:

1. Did the District Court have jurisdiction over Cohen's claim against Powell & Oakes based upon diversity of citizenship?

2. If the District Court did not have diversity jurisdiction as to Cohen's claim against Powell & Oakes, did Cohen's Complaint allege any facts as against Powell & Oakes which would support federal question jurisdiction?

3. Did the District Court, in any event, properly conclude that Cohen's claim against Powell & Oakes was barred by the applicable Indiana statute of limitations?

STATEMENT OF THE CASE

This action was commenced by Cohen on April 21, 1972, by the filing of a complaint against all respondents in the United States District Court for the Southern District of Indiana. Omitting the caption, the complaint reads as follows:

> "1. Jurisdiction of Anchor Hocking Glass is founded on diversity of citizenship. Plaintiff is a citizen of the State of Indiana and Defendant Anchor Hocking Glass Corporation is a corporation incorporated under the laws of the State of Delaware having its principal place of business in a state other than the State of Indiana.

"2. Powell & Oakes, Inc., is a corporation incorporated under the laws of the State of Indiana and jurisdiction is founded on the basis of a federal question, and federal statutes.

"3. Herman Grant, defendant, is Regional Attorney for the United States Department of Labor, Wage & Hour & Public Contracts Divisions, and jurisdiction is based on a federal question, and federal statutes.

"4. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

"5. The action arises under the Federal Tort Claims Act of 1946, 60 Stat. 842, Title 28 United States Code Section 410; Title 28 United States Code Annotated, Section 753; Title 28 United States Code Annotated Federal Rules of Civil Procedure Nos. 30(b), 30(f), 30(e), 45(f); Title 28 United States Code Annotated Section 1651.

"6. Plaintiff is a practicing attorney admitted to the practice of law in the State of Indiana, County of Marion, Indianapolis. He was admitted to the practice of law on May 17, 1967. Anchor Hocking Glass Corporation, defendant, hereinafter called Anchor Hocking, is a corporation engaged in the manufacture of glass products and the plant in this case is located in Winchester, Indiana. Powell & Oakes, Inc., is a corporation engaged in the taking of depositions through its employees who are notaries public for the purpose of submission to all courts of competent jurisdiction. Dorothy E. Huffman was the court reporter involved in this cause of action and was an employee of Powell & Oakes, Inc. See Exhibit A. The foregoing defendant was hired by the firm of Barnes, Hickam, Pantzer and Boyd, attorneys for defendant Anchor Hocking, to take a deposition from plaintiff. See Exhibit B—Copy of

subpoena duces tecum issued by Charles E. Bruess, attorney for defendant. Mr. Frederic Anderson was the attorney who conducted the taking of the oral deposition and the interrogation of plaintiff for two and one-half hours, specifically from 10:00 a.m. to 1:00 p.m. on February 5, 1969. Herman Grant, defendant, is in charge of the Regional Office of the United States Department of Labor, Wage & Hour & Public Contracts Divisions. Mr. John Secaras, attorney, and John Seiger, attorney, were involved in this cause of action. Mr. Secaras, attorney for the United States Government, first contacted plaintiff by telephone about the case of Wirtz v. Anchor Hocking Glass Corporation, Cause No. 67-C-140 which was pending in the United States District Court for the Southern District of Indiana, Indianapolis, Division. See Exhibit B. Mr. Seiger represented the United States Government at the taking of the oral deposition. Plaintiff was involved as a result of an investigation conducted by him of Anchor Hocking, defendant, in November 1957. Plaintiff was an investigator for the Wage & Hour Division, United States Department of Labor.

"7. Plaintiff alleges that the deposition taken from him on February 5, 1969, was defamatory by imputing that he was lying under oath and thereby guilty of perjury.

"8. Plaintiff alleges Dorothy E. Huffman, a public officer, i.e., a notary public, was guilty of misfeasance of office by failing to submit the deposition and Exhibits A and B, specifically, The Form FO-51, the statistical report of the 1957 investigation report completed by plaintiff and the FO-51A Narrative report completed by plaintiff and submitted at the deposition as evidence by Mr. Seiger, government attorney, with the applicable deletions in the narrative report by means of blacking out several important sentences which defamed plain-

tiff. Ind. Annot. Stat. Stat. Section 2-602 (Burns 1967 Repl.). Failing to submit the deposition to the United States District Court for the Southern District of Indiana, Indianapolis Division, constitutes continuing civil contempt as delineated by Title 28 Fed. Rules of Civ. Proc. No. 45.

"9. Plaintiff alleges that Powell & Oakes, Inc. through its employee, Dorothy E. Huffman, was guilty of misfeasance of office by failing to submit the deposition to plaintiff for perusal and changes and signature.

"10. Plaintiff alleges that it was defamatory for the deposition to be published as it was without ever submitting it to plaintiff.

"11. Plaintiff alleges that the publishing of a deposition—Mr. Seiger called plaintiff by telephone requesting certain information about the deposition submitted to him as a copy by Dorothy E. Huffman one week after the deposition was taken—taken by a public officer and court reporter purporting to be a true copy of sworn testimony constitutes false attestation as delineated by Ind. Annot. Stat. Sections 10-3602—10-3606 (Burns 1956 Repl.)

"12. Plaintiff alleges that he was deprived of due process of law by not being allowed to read and make appropriate changes as required by the Federal Rules of Civil Procedure before the deposition was published.

"13. Plaintiff alleges that there was concealment and intent to defame by not submitting the deposition, and Exhibits A and B to the Court. Ind. Annot. Stat. Section 2-609 (Burns 1967 Repl.)

"14. Plaintiff alleges that permission to read investigation report at the Wage & Hour Office under the supervision of Kenneth Graue, supervisor of the Indianapolis district office granted by Herman

Grant, regional attorney for the United States Department of Labor, was done specifically to entrap plaintiff by refreshing his memory and was a civil conspiracy to defame plaintiff. The perusal of the investigation report was accomplished on November 7, 1968.

"15. Plaintiff requests trial by jury.

"16. Plaintiff requests that the court issue an order of mandamus under Title 28 United States Code Annotated Section 1651 to all defendants. Plaintiff particularly requests that Powell & Oakes Inc., defendant, submit a true copy of the transcript to the Court as required by the Federal Rules of Civil Procedure together with the evidentiary Exhibits A and B. The foregoing are under the jurisdiction of the United States District Court and should be in *custodia legis* as property of the Court and to withhold such legal documents taken under the aegis of the Court's jurisdiction constitutes continuing civil contempt as long as defendant Powell & Oakes, Inc., intentionally withholds (sic) the documents from the Court. The case of Wirtz v. Anchor Hocking Glass Corporation, in the United States District Court for the Southern District of Indiana was closed with prejudice on April 24, 1969. Chief Judge Steckler was the judge in the case no. IP-67-140.

"17. Plaintiff alleges that by reason of the facts hereinabove set forth plaintiff has been injured in his reputation and in his good name as an attorney and in his practice in the sum of $125,000.00 compensatory damages and $125,000.00 in exemplary damages.

"Wherefore plaintiff demands judgment of $250,000.00 and for all other proper relief." (Rec., p. 6-11)

The Wirtz case referred to in Cohen's complaint was never tried, Cohen's deposition was never used in

any fashion, and on April 24, 1969, the case was dismissed pursuant to a stipulation between the parties. (Rec. p. 153)

To this complaint, Powell & Oakes filed a motion to dismiss under Rule 12(b)(6) asserting that Cohen's complaint failed to state a claim upon which relief could be granted. The District Court sustained that motion on November 15, 1973, and the case as to Powell & Oakes was dismissed. The memorandum opinion of the District Court appended to Cohen's brief indicates that the basis of the dismissal was that, as to Powell & Oakes, the applicable statute of limitations had expired and that Cohen had failed to allege any legitimate federal question facts. Summary judgment was not granted to Powell & Oakes by the District Court. That relief was only given to respondents Anchor Hocking Glass Corporation and Herman Grant.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment as to Powell & Oakes on the basis that the District Court lacked jurisdiction, holding that there was no diversity of citizenship between Cohen and Powell & Oakes and that Cohen's complaint failed to present any legitimate federal question.

ARGUMENT

Cohen Has Failed To Comply With 28 USC 2101(c) and Supreme Court Rules

Petitioner has failed to comply with the applicable statutory rule regarding the time for filing a petition for writ of certiorari and the rules of this Court governing the certiorari procedure. The petition should therefore be dismissed.

28 USC 2101(c) requires that the petition for writ of certiorari be filed within 90 days after the entry of the judgment or decree involved. Rehearing by the United States Court of Appeals for the Seventh Circuit was denied on June 30, 1975. Petitioner presented his petition for Writ or Certiorari to the Clerk of this Court on September 22, 1975. The Court records available to counsel for Powell & Oakes do not reflect precisely what took place on that date. It appears that the Clerk found the brief illegible and ordered it reprinted. Subsequently, the petition was apparently accepted by the Clerk. On October 16, 1975, the attorney for Powell & Oakes received by mail a Petition for Writ of Certiorari with a letter of transmittal from petitioner. The Petition for Writ of Certiorari received by counsel for Powell & Oakes bore no docket number and is identical to that received by the Clerk on September 22, 1975, but apparently rejected.

Rule 21(3) of the Rules of the Supreme Court of the United States requires that petitioner, when filing his petition, file proof of service as provided by Rule 33 and further requires that petitioner notify all respondents on the appropriate form of the date of filing and of the docket number of the case. To this date, counsel for Powell & Oakes has never received the notification of filing and docket number required by Rule 21(3). It was only by calling the Clerk's office after receipt of the petition that the docket number and the due date for Powell & Oakes' brief were obtained. Moreover, to the knowledge of counsel for Powell & Oakes, no certificate of service complying with Rule 33 has ever been filed by Cohen.

Finally, Cohen has failed to comply with Rule 23(4). Throughout the petition, references are made to matters in the record without any reference to the pages wherein such matters are allegedly found. The statement of the case is a rambling 13 page narrative with references to cases and statutes and is not germane or relevant to the issues which Cohen apparently seeks to present as to Powell & Oakes. The opinion of the United States District Court for the Southern District of Indiana, Indianapolis Division, "appended" to the petition shows that Cohen's complaint as to Powell & Oakes was dismissed pursuant to Rule 12(b)(6) motion—yet nowhere is the complaint set forth nor is any reference made to the record. Lastly, though Cohen asserts three separate reasons for granting the writ (Petition, p. 17) nowhere does Cohen spell out—even inferentially—how any action of the lower courts has placed this case within purview of the recognized bases for granting such a petition.

There Was No Diversity of Citizenship Between Cohen and Powell & Oakes

It is axiomatic that complete diversity between all plaintiffs and all defendants is required to sustain diversity jurisdiction under 28 USC 1332. *Strawbridge* v. *Curtiss*, (1806) 7 U.S. (3 Cranch) 267. 28 USC 1332(c) makes a corporate party a citizen of the state of its incorporation. Cohen's complaint alleged that he was a citizen of the State of Indiana and that "Powell & Oakes, Inc. is a corporation incorporated under the laws of the State of Indiana . . ." Consequently, Cohen's complaint showed upon its face that there was no diversity jurisdiction as between Cohen and Powell & Oakes.

Although it is difficult to discern from the contents of Cohen's petition, he apparently attempts to circumvent this rule by arguing that diversity of citizenship exists because Powell & Oakes was an agent of respondent Anchor Hocking (a party as to whom there was diversity of citizenship). Cohen cites no case nor does he advance any argument which even remotely places this contention within Rule 19. Even so, and even admitting that Powell & Oakes was an agent of Anchor Hocking, it can in no way change the citizenship relationship between Cohen and Powell & Oakes. Cohen sued Powell & Oakes and sought a money damage recovery against it. Consequently, while the relationship between Powell & Oakes and Anchor Hocking might be relevant to Cohen's rights *against Anchor Hocking*, it is completely irrelevant to his rights *against Powell & Oakes*. Whatever the relationship between Powell & Oakes and Anchor Hocking may have been—agency or otherwise—such relationship cannot alter the identity of citizenship involved and thereby create diversity jurisdiction.

Cohen's Complaint Presented No Federal Question Claim as Against Powell & Oakes

In paragraph 2 of his complaint, Cohen also alleged, as to Powell & Oakes, Inc., that "jurisdiction is founded on the basis of a Federal question, and Federal statutes". Presumably, Cohen is referring to Article III, Section 2, of the United States Constitution giving Federal courts jurisdiction of cases "arising under this Constitution, the Laws of the United States, and treaties . . ." as implemented by 28 U.S.C. § 1331.

The principles by which it is determined whether or not a "federal question" case is presented have long

been established by this Court. These principles are most concisely and directly stated in *Shulthis* v. *McDougal*, (1911), 225 U.S. 561, 56 L.Ed. 1205, 1211-1212, where the court stated:

> "1. Whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, must be determined from the complainant's statement of his own cause of action as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings. (Citations omitted)
>
> 2. It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred argumentatively from the statements in the bill, for jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth. (Citations omitted)
>
> 3. A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends." (Citations omitted)

Accord: Lovell v. *Newman*, (1913), 227 U.S. 412, 57 L.Ed. 577; *Spencer* v. *Duplan Silk Co.*, (1903), 191 U.S. 526, 48 L.Ed. 287.

Tested by these principles, it is manifestly clear that Cohen's complaint presents no Federal question. The Federal Tort Claims Act is not applicable to Powell & Oakes, Inc.— only to the United States of America which is not a party. 28 U.S.C. § 753 (see paragraph 5 of Cohen's complaint) relates to court reporters ap-

pointed by the District Courts and their duties and functions.

28 USC 1651 (see paragraph 5 of Cohen's complaint) provides that federal courts may issue all writs in aid of their jurisdiction. Cohen sought a writ of mandamus from the District Court. However, the writ of mandamus has been abolished in the District Court. F.R.C.P. 81(b). Irrespective, a mandamus type remedy is an ancillary remedy to be utilized only in the exercise of jurisdiction already acquired and is not an independent basis of jurisdiction. *Craig* v. *California,* (7th Cir., 1967) 376 F.2d 583. Moreover, relief in the nature of mandamus as sought by Cohen against these individual defendants would have been inappropriate. *Finley* v. *Chandler,* (7th Cir., 1967) 377 F.2d 548, cert. den., 389 U.S. 869. Seeking inappropriate relief is no basis for federal question jurisdiction.

The only remaining possible federal question claim presented by Cohen's complaint is his allegation that Dorothy Huffman, the reporter, "deprived . . . (plaintiff) . . . of due process of law by not being allowed to read and make appropriate changes as required by the Federal Rules of Civil Procedure before the deposition was published." (Complaint, paragraph 12) FRCP 30 governs the taking of depositions upon oral examination and members of this Honorable Court are well aware of the procedures and steps followed in such cases:

1. The deponent is examined orally and the testimony is recorded by the reporter.

2. The reporter transcribes the oral testimony.

3. Copies of the transcribed deposition are sent to participating counsel who have requested a

> copy and the original is transmitted to the court if signature is waived or submitted to the deponent if it is not and, after any corrections, it is filed.

The point is, simply, that the attorneys with a right to a copy of the deposition have it in hand at the same time as the deponent. Thus, in this case, Cohen's deposition was "published" and in the hands of the attorneys involved in accordance with accepted practice and procedure under FRCP 30 and not in violation of the "accepted and usual course of judicial proceedings." Whether Cohen ever saw the deposition, read it or signed it is irrelevant even conceding his right to do so. Whether or not the deposition was ever filed with the District Court is also irrelevant even conceding the obligation of Dorothy Huffman to do so. In other words, even admitting that these technical omissions occurred and thus violated F.R.C.P. 30, they could not change the basic, pleaded and admitted facts that the deposition as transcribed was properly in the hands of the involved attorneys in a lawful and correct fashion and that the deposition was never used in the proceeding because it was dismissed upon a stipulation of the parties 2½ months after the deposition was taken.

Merely asserting that some act or omission constitutes a denial of due process does not make it so and Cohen has cited no case to support his contention that these failures constitute a denial of due process. The whole basis of Cohen's complaint is one for alleged defamation, and no other conclusion is possible from a reading of the complaint. As to Powell & Oakes, the asserted defamation consists of the alleged failures of the court reporter, Dorothy Huffman. However, even if an actionable claim exists against Powell & Oakes

on the basis that the Court Reporter, Dorothy Huffman, failed to comply with F.R.C.P. 30, such failure would merely be the foundation of a breach of duty establishing a simple tort claim requiring diversity of citizenship for federal jurisdiction. In no fashion could the determination of Cohen's action depend, really and substantially, upon the validity, construction or effect of F.R.C.P. 30—the vital test of federal question jurisdiction.

The Statute of Limitations Barred Cohen's Claim Against Powell & Oakes

As stated, the whole thrust of Cohen's complaint is an action for defamation. However, regardless of how categorized in that regard, it is clearly an action for an alleged injury to Cohen's person or character. The deposition in question was taken on February 5, 1969. Cohen's complaint, in paragraph 11, alleges that the deposition was reported and distributed within one week after it was taken and that he knew it. The complaint in this case was filed on April 21, 1972, over three years later.

The Indiana statute of limitations for injuries to person or character is found in IC 1971, 34-1-2-2 (Burns' Code Ed) which provides:

> "The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards.
>
> First. For injuries to person or character . . . within two (2) years . . ."

Under Indiana law, an action for libel is an action for injury to character. *Hamilton* v. *Lowery*, (1903), 33 Ind. App. 184, 189, 71 N.E. 54. Libel is one form of

defamation and clearly, the very interest intended to be protected in the tort of defamation is the character of the plaintiff.

Cohen asserted that his action against Powell & Oakes, Inc. involved the five-year statute of limitations found in Burns IC 1971, 34-1-2-2 (Burns Code Ed):

> "Second. All actions against the Sheriff, or other public officers . . . growing out of a liability incurred by doing an act in an official capacity, or by the omission of an official duty, within five (5) years."

Initially, it is again repeated that this is an action by Cohen for alleged injury to his person or character —defamation. There is a specific statute of limitations as to such claims. Moreover, IC 1971, 34-1-2-2, by its terms, only applies to "public officers". Powell & Oakes is not a "public officer". Cohen's complaint alleges Powell & Oakes is a corporation and that the deposition was taken by one Dorothy Huffman who is alleged to have been a notary public and an employee of Powell & Oakes. This Court judicially knows that notaries public are, and must be, individual persons. Consequently, even though the notary public-reporter, Dorothy Huffman, might be a public officer, Powell & Oakes, Inc. is not. The allegation of agency cannot avail Cohen for the statute of limitations he argues for refers specifically to "public officers" only.

REASONS FOR DENYING THE WRIT AS TO POWELL & OAKES

Cohen's Petition should be denied because there is nothing in it to show how this case fits within the requirements of Supreme Court Rule 19.

No case is cited by Cohen demonstrating that the decision of the United States Court of Appeals for the

7th Circuit conflicts with that of another court of appeals on the same matter.

Cohen does not assert that an important state or territorial question is involved or that such question has been decided in a way in conflict with applicable state or territorial law.

Cohen does not assert that an important question of federal laws was decided in this case which has not, but should be, settled by this Court.

Cohen's complaint presented no federal question as to Powell & Oakes and no case or authority is cited by Cohen that even inferentially suggests that the United States Court of Appeals for the 7th Circuit decided a federal question in a way in conflict with applicable decisions of this court.

Finally, this case does not involve—despite Cohen's assertion—any departure from the accepted and usual course of judicial proceedings insofar as Powell & Oakes is concerned. The facts alleged by Cohen in respect to the transcription, recording and handling of his deposition occurred in another case and Cohen merely asserts that those facts somehow provide the basis of a claim against Powell & Oakes. The summary judgment procedure was not utilized by the District Court as to Powell & Oakes—it simply granted the Rule 12(b)(6) motion of Powell & Oakes which was directed at Cohen's complaint.

CONCLUSION

There was no diversity of citizenship between Cohen and Powell & Oakes. Cohen's complaint alleged no facts from which it could be inferred that the result of his claim against Powell & Oakes really substantially

involved a dispute or controversy respecting the validity, construction or effect of the laws of the United States—the test of federal question jurisdiction. Finally, in all events, Cohen's complaint showed on its face that the statute of limitations barred his claim against Powell & Oakes as the District Court held.

WHEREFORE, Respondent Powell & Oakes prays that Cohen's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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